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Oral Arguments Set for Major False Claims Act Case Pending Before Supreme Court

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The U.S. Supreme Court is set to hear oral arguments on April 19, 2016 in *Universal Health Services, Inc. v. United States ex rel. Escobar*, a key case addressing the implied certification theory of liability under the False Claims Act (FCA). Under the implied certification theory, a person or entity can be held liable under the FCA for failing to comply with statutory, regulatory, and contractual requirements that are "pre-conditions of payment."

Theories of Liability Under the False Claims Act—Express Certification and Implied Certification

As background, to establish liability under the FCA, there must be a false claim. Federal courts generally have distinguished between two types of false claims—factually false claims and legally false claims. Factually false claims "involve[] an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided."[1] For example, altering billing codes to receive reimbursements for uncovered procedures, using improper billing codes to avoid downward adjustments in reimbursement, and upcoding to more lucrative procedures all constitute factually false claims.[2] Legally false claims involve a false certification when requesting payment from the government. Federal courts have distinguished two types of certifications—those that are express and those that are implied. An express certification is one where a contractor "falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment."[3] For example, certifying compliance with an agreement banning incentivized recruiting payments at higher education facilities to receive federal funds yet violating those payment restrictions constitutes a false claim under the express certification of compliance theory.[4] An implied certification occurs when a "claimant seeks and makes a claim for payment from the government without disclosing that it violated regulations that affected its eligibility for payment,"[5] "even though a certification of compliance is not required in the process of submitting the claim."[6] In determining whether implied liability will attach, most courts look to the underlying contracts, statutes, or regulations—rather than examine the defendant's representations to the government—and ask whether they make compliance a prerequisite for the government's payment.[7]

Differing Views Among Circuits of the Implied Certification Theory

Over the years, federal courts have taken differing views on the viability of the implied certification theory and what constitutes a "pre-condition of payment." Some look only to statutes and regulations, others go beyond both. For instance, the First Circuit in *Universal Health* held that a pre-condition of payment "need not be expressly designated" and can be established through a "fact-intensive and context-specific inquiry."[8] Thus, contractual as well as statutory and regulatory

provisions can constitute preconditions of payment.[9] In contrast, the Second Circuit concluded that implied certification liability will only rest where the underlying statute or regulation expressly states that the provider must comply to be paid.[10]

The First Circuit's approach has been criticized by many in the health care industry and other highly regulated industries since it: (a) greatly expands the reach of the FCA, harshly penalizing regulatory and contractual noncompliance that is unrelated or highly attenuated to the submission of a claim, and (b) incentivizes opportunistic whistleblowers to file qui tam litigation seeking compensation for all manner of regulatory and contractual violations. Undoubtedly, the health care industry and government contractors are looking to the Supreme Court to place firmer limits on the implied certification theory or overturn it altogether.

Universal Health **at the District and Circuit Courts**

The *Universal Health* case arose from an unfortunate set of facts. A young woman received substandard care from unlicensed and unsupervised staff working at a mental health clinic, which ultimately resulted in her death. Her parents filed complaints with state agencies about the mental health clinic's conduct and the agencies determined that the mental health facility had been out-of-compliance with state law. The parents of the young woman later filed suit under the FCA on the theory that the mental health facility fraudulently represented that its staff members were properly licensed and supervised and therefore fraudulently billed the Medicaid program for services rendered by these individuals.

The United States did not intervene in the case, and the district court found the Massachusetts regulations that were violated were conditions of participation, not conditions of payment.[11] The court dismissed the matter, finding that the allegations were insufficient to state a claim under the FCA.[12] The First Circuit reversed, holding that the state laws the clinics violated were conditions of payment and sufficient to state a claim under the FCA.[13]

Universal Health **and Implied Certification at the Supreme Court**

The Supreme Court granted certiorari on December 4, 2015 to determine whether the implied certification theory is viable and, if so, whether the underlying statute, regulation, or contractual provision upon which liability rests must expressly state that it is a condition of payment. The Supreme Court steps into the breach following a split among the federal circuits. While a majority of federal courts, including the First Circuit, recognize the theory, the Seventh Circuit has rejected it. The Seventh Circuit determined that statutes and regulations incorporated by reference into government contracts are not conditions of payment, and that agencies—not courts via the FCA—are the appropriate actors to enforce violations of conditions of participation.[14] The Circuits that permit liability also are split on whether the underlying statute, regulation, or contractual provision must expressly state that it is a condition of payment for the submission to be false.[15]

The parties asked the Supreme Court to repair these splits.

In its briefing, Universal Health argued:

- The text of the FCA requires an affirmative misstatement for liability.
- Since the FCA does not impose a duty to disclose all compliance violations, there can be no resulting liability when a party does not disclose a violation. Any other treatment would expand traditional notions of fraud.
- Fines, suspensions, or other administrative legal actions suffice to ensure compliance, making the FCA unnecessary.

- In the alternative, should the Supreme Court uphold the implied certification theory, it should limit its reach to violations of statutory, regulatory, and contractual provisions that expressly state that they are preconditions of payment.

The Relators countered that:

- An express false statement is unnecessary to trigger liability under the FCA because a claim to government funds contains an implied representation of legal entitlement to the funds.
- An omission of material facts constitutes fraud, meaning that no affirmative statement is necessary to make a false claim to the government.
- The FCA imposes liability for the presentation of a false or fraudulent claim, so a false statement is unnecessary for FCA liability.
- The scope of the FCA should be broadly interpreted to meet the government's prophylactic and remedial goals to combat fraud.

While the United States has not intervened in the case, it did file an amicus brief on March 3, supporting the Relators' arguments. The Justice Department contended that:

- So long as the claimant knows the representations are untrue, his implied or express representations that he satisfied material contractual and legal requirements provide the basis for FCA liability.
- Liability for common law fraud can be triggered by false statements, misrepresentations, and omissions. The implied certification theory, which is rooted in a material omission, is consistent with the common law definition of fraud, supports the purposes of the FCA, and falls within Supreme Court precedent.
- The FCA's knowledge and materiality requirements protect negligent and good faith actors from liability.
- The Massachusetts regulations were explicit preconditions of payment and even if they were not, failing to comply with material requirements is an FCA violation because the failure affects the government's willingness to pay.
- Requiring the government to specify every regulation resulting in FCA liability would undermine the FCA's purpose, enabling persons to know precisely which requirements to avoid.

Conclusion

As the case law and the briefs show, the parties, the government, and the lower courts remain at odds over the application of the implied certification theory. The Circuit split about the theory's viability and application creates differing rules for FCA liability across the country. This case has wide and far-reaching implications for the health care industry, government contractors, and other highly regulated businesses that rely on government funding.

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[1] *Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001).

[2] *Hill v. Morehouse Med. Assos., Inc.,* No. 02-14429, 2003 WL 22019936, at *4 (11th Cir. Aug. 15, 2003) (per curiam).

[3] *Mikes*, 274 F.3d at 698.

[4] *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1168-69 (9th Cir. 2006).

[5] *United States ex rel. Wilkins v. United Health Grp*., Inc., 659 F.3d 295, 305 (3d Cir. 2011).

[6] *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010).

[7] *Wilkins*, 659 F.3d at 313.

[8] *United States v. Universal Health Servs., Inc.,* 780 F.3d 504, 512-13 (1st Cir.), *cert. granted*, 136 S. Ct. 582 (2015).

[9] *United States ex rel. Hutcheson v. Blackstone Med., Inc.,* 647 F.3d 377, 388 (1st Cir. 2011).

[10] *Mikes*, 274 F.3d at 699 (determining that Medicare provision prohibiting payment for unreasonable and unnecessary services is a pre-condition of payment).

[11] *United States ex rel. Escobar v. Universal Health Servs., Inc.,* No. CIV.A. 11-11170-DPW, 2014 WL 1271757, at *6-10 (D. Mass. Mar. 26, 2014).

[12] *Id*. at *13.

[13] *Universal Health Servs., Inc.,* 780 F.3d at 513-14.

[14] *United States v. Sanford-Brown, Ltd.,* 788 F.3d 696, 712 (7th Cir. 2015), *pet. for cert. docketed*, *United States ex rel. Nelson v. Sanford-Brown*, Ltd., No 15-729 (U.S. Dec. 2, 2015).

[15] *Compare Mikes*, 274 F.3d at 700 ("[I]mplied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies expressly states the provider must comply in order to be paid.") *with United States v. Triple Canopy, Inc.*, 775 F.3d 628, 637 n.5 (4th Cir. 2015) ("[N]othing in the statute's language specifically requires such a[n express] rule, and we decline to impose [this] requirement."), *pet. for cert docketed*, *Triple Canopy, Inc. v. United States ex rel. Badr,* No. 14-1440 (U.S. June 8, 2015).

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